FEB 12 1968 SUPREME COURT U. S.

IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,

Petitioner,

vs.

UNITED ARTISTS TELEVISION, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Motion for Permission to File Brief Amici Curiae in Support of Respondent and Brief.

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Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Pursuant to Rules 35 and 42(3) of the Rules of this Court, the Writers Guild of America (WGA), the Screen Actors Guild (SAG), the Directors Guild of America (DGA), and the American Federation of Television and Radio Artists (AFTRA), (all sometimes referred to simply as "Guilds") respectfully move the Court to grant them permission to file a Brief Amici Curiae herein in support of Respondent on the following grounds:

1. The Guilds have requested permission of both parties herein to file a Brief Amici Curiae. On January 29, 1967, Petitioner Fortnightly Corporation re-

fused such permission, but stated through its attorneys that it would not file any formal opposition to a motion by the Guilds for permission to file a Brief Amici Curiae.

2. Each of the Guilds is the collective bargaining agent of employees who collectively constitute the artistic and creative personnel of the entertainment industry.

(a) WGA represents all writers employed by producers (including producers of motion pictures distributed by Respondent, United Artists Television, Inc.) for the purpose of preparing literary material for entertainment motion pictures produced primarily for exhibition over television, as well as all writers in the motion picture industry, and all writers of live TV programs.

(b) SAG represents all actors employed by producers referred to in (a) above and in the motion picture industry generally.

(c) DGA represents all directors employed by producers referred to in (a) above and in the motion picture industry generally.

(d) AFTRA represents all performers, including actors and announcers, who perform on live and recorded television programs and commercials as well as in radio, phonograph records and transcriptions.

3. Each of the Guilds has collective bargaining agreements with producers of films produced for or

exhibited over television. Said films, as in the instant case, are invariably protected by copyright. These collective bargaining agreements are to a large degree premised on the producer's ownership of the films and of the copyright and on the producer's control of the distribution and consequently of the exhibition of the films. Each of the agreements establishes minimum wage or salary scales for employment, and each provides for additional compensation in the form of residual payments to employees for exhibition of theatrical pictures on television and for repeat exhibition of television films (after the initial showing). The minimum residual payments required are, in the case of theatrical films, based on the proceeds derived by the producer (or distributor) of the films from the licensing of said films for exhibition over television. The patterns of employment and compensation of members of the Guilds will therefore be directly affected by the outcome of this matter, and consequently the Guilds are each vitally interested.

4. The question presented is whether CATV reproduction and broadcast constitute a copyright infringement of Respondent's copyrighted motion pictures. Respondent (or those in privy with it) are obligated to make residual payments to talent for television broadcasts of such motion pictures under circumstances elaborated on in our brief on the merits. CATV reproducers and broadcasters presently appropriate for their own profit the television broadcasts of such moton pictures,

which originate at stations which have paid for the license to broadcast the motion pictures. CATV broadcasters claim the right to so appropriate and broadcast the pictures without payment to Respondent, the distributor, the originating television broadcaster, or the creative talent.

5. The Guilds wish to make clear the far reach which the decision herein may have on employment and compensation patterns which have been created by a long history of collective bargaining.

Respectfully submitted this 9th day of February, 1968.

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INTRODUCTION.

A. Interest of Talent Guilds.

The Talent Guilds who have joined in this Brief represent the actors and other performers, writers and directors whose creative talents are utilized in the production of theatrical and television motion pictures and live and recorded television programs.[1] These artists have a vital concern in the outcome of this case. Their interest is a fundamental one, namely, that their livelihood would be affected and, in fact, seriously jeopardized if Petitioner's CATV system and other like systems were held to be entitled to freely pick up the television broadcasts of copyrighted motion pictures and television programs and transmit them to their paying subscribers without liability for copyright infringement.

This statement is neither exaggerated nor lightly made. Because the facts which support it may be overlooked in the clash of interests of the immediate parties to this proceeding, the Talent Guilds deem it appropriate, and indeed, essential to set them forth herein.

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[1]Screen Actors Guild (SAG) affiliated with AFL-CIO; membership over 18,000 members; represents performers employed in the production of theatrical and television motion pictures and television filmed commercials. Writers Guild of America (WGA) membership over 3,000 writers; represents writers who write for theatrical motion pictures, television motion pictures and live and recorded television programs. Directors Guild of America (DGA) membership over 3,300; represents directors, assistant directors, associate directors and stage managers who direct performers in theatrical motion pictures, television motion pictures and live and recorded television programs and commercials. American Federation of Television and Radio Artists (AFTRA) affiliated with AFL-CIO; membership over 16,000 members; represents performers in live and recorded television programs and commercials.

Central to an exposition of the economic detriment which would be sustained by members of the Talent Guilds from a recognition of Petitioner's position is an understanding of the structure and pattern of compensation to talent established under the collective bargaining contracts which exist between the Talent Guilds and the motion picture producers and television networks and stations. This pattern is historical, unique and indigenous to the nature of the Television Industry.

B. Television Payments to Talent Under the Collective Bargaining Contracts Between the Talent Guilds and the Motion Picture Producers and Television Networks and Stations.

Though they differ in detail, the respective collective bargaining agreements of the Talent Guilds follow the same general pattern with respect to payments to talent for television exhibition of theatrical and television pictures. Such payments are generally referred to in the industry as "residuals." As Screen Actors Guild is the largest of the Talent Guilds and has historically led the way for other Guilds in this area, its contracts will serve to illustrate the nature of residual payments.

1. Collective Bargaining Contracts of Screen Actors Guild.

The collective bargaining contracts of Screen Actors Guild provide a number of different formulas for the payment of residuals to actors.

For motion pictures produced in the period between August 1, 1960, and January 31, 1966, the collective bargaining contracts between Screen Actors Guild and the motion picture producers require the payment of 3.6% of the distributor's world-wide gross receipts de-

rived from the television exhibition of such motion pictures, for ratable distribution among the actors performing in such motion pictures.

For pictures produced subsequent to January 31, 1966, payments are made under a formula providing for the payment to each actor appearing in a motion picture, of a percentage of a specified base fee when such motion picture is first telecast and additional percentages when the distributor's gross receipts from such television exhibition reach certain stated amounts.[2]

For example, a free lance actor (actor engaged for a single picture) who works in a motion picture for a period of one week, is entitled to be paid 30% of a base fee of $300, or $90, when such motion picture is first exhibited on television. When the distributor's gross receipts from television reach the sum of $125,000, an additional 12½% of such base fee becomes payable. Similarly, when such gross receipts reach additional amounts, further percentages of such base fee become payable to the actor.

Actors who perform in motion pictures made primarily for television exhibition are likewise entitled to be paid additional compensation in the form of "rerun fees" each time such picture is retelecast in the same city for up to a total of ten such telecasts. Such fees are each percentages of the actor's original applicable minimum scale and aggregate an additional 225% of such initial minimum applicable scale.[3] Additional amounts equal to 6½% of the amount of such rerun fees are also payable to the Producer-Screen Actors

[2]See Appendix, Section A.
[3]See Appendix, Section B.

Guild Pension and Welfare Fund to provide pension and welfare benefits to actors.

In short, the compensation which actors receive from the television exhibition of the motion pictures in which they appear is directly geared either to the producer's gross receipts from such television exhibition or to the number of times the film is replayed on television. Many years of study and effort have been expended by the Screen Actors Guild in negotiations with motion picture producers to establish this system of compensation which has proven to be the fairest and most equitable means of compensating actors for the use and reuse of their performances in the television field.[4]

This is so because no one knows, at the time a theatrical motion picture is first shown on television or when a television program is first telecast, how many stations will purchase the right to exhibit the picture or program, or how successful it will be. It is therefore virtually impossible at the time of employment to fix a sum which adequately and fairly compensates actors for their services. If the amount fixed were low and the picture or program attained wide popularity, was repeatedly exhibited on television and returned a very substantial gross income to the producer, the amount might well be unfair to the actor. On the other hand, if the figure fixed were high, it would be unfair to the producer if the results of the telecasting were financially disappointing. In effect, residuals pro-

[4]The principle of additional payment to performers for reuse of their performances had its inception more than 25 years ago in the early collective bargaining contracts between the American Federation of Radio Artists and the radio networks and stations under which radio performers were paid additional compensation when recorded radio programs in which they performed were rebroadcast in the same area at a later time.

vide the means by which a performer shares in the success of a television program: the greater the use and exposure of the actor, the greater the compensation.[5]

Residuals are paid to all actors whose services are utilized in pictures that are shown on television, from stars and featured players down to the small part players and bit players who work at the minimum scale. This latter group comprise the bulk of the membership of the Guild. Such actors work very irregularly and depend on residuals for an important part of their income.[6] Since the inception of the residual structure in the collective bargaining contracts of Screen Actors Guild in 1952, more than 70 million dollars in residual payments have been paid to actors, plus substantial additional amounts paid to the actor's Pension and Welfare Plans.

2. Collective Bargaining Contracts of Writers Guild of America.

The collective bargaining contracts between Writers Guild of America and the film producers provide, as to theatrical motion pictures, for a payment to the writers of the story and screen play of 1.2% of the distributor's world-wide gross receipts from the television exhibition of such motion pictures, and in the case

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[5]The modern collective bargaining contracts between Screen Actors Guild and the film producers provide complicated and sophisticated arrangements for such payments. These include an obligation on the part of the producer to obtain "Assumption Agreements" from its distributor or those who purchase the film or the television rights therein by which such distributor or purchaser becomes directly liable to Screen Actors Guild to make such payments. See Appendix.

[6]Statement Charlton Heston. Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-Ninth Congress, Second Session on S 1006 (1966) p. 207.

of television motion pictures, provide additional compensation for reruns under a formula similar to that in effect between the Screen Actors Guild and the film producers.[7] Like actors, writers depend on residuals to achieve a level of compensation which makes it possible for them to continue writing for motion pictures.[8]

3. Collective Bargaining Contracts of Directors Guild of America.

The collective bargaining contracts of Directors Guild of America provide, in the case of theatrical motion pictures, that 1.2% of the distributor's world-wide gross receipts derived from the television exhibition of such motion pictures, shall be paid into the Pension Fund of the Directors Guild. In the case of television motion pictures, they provide additional compensation for reruns under a formula similar to that of the Writers Guild.

4. Collective Bargaining Contracts of American Federation of Television and Radio Artists.

The American Federation of Television and Radio Artists has collective bargaining contracts with the television networks and independent television stations providing for additional payments to performers in live and recorded television programs when recordings

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[7]The Writers Guild of America 1966 Television Film Basic Agreement provides rerun fees to writers who receive story and teleplay screen credit for each rerun up to six, aggregating 165% of the writer's applicable minimum compensation for services in writing the story or teleplay.

[8]Statement Evelyn F. Burkey, Executive Director, Writers Guild of America East, Inc. Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-Ninth Congress Second Session on S 1006 (1966) p. 228.

of such programs are reused a second and subsequent times in the same broadcasting area.[9] Payments are also required for "syndication" on local non-interconnected stations, cable, recording or other means, for closed circuit television use and for pay television. Thus, the collective bargaining contracts of the American Federation of Television and Radio Artists, like those of the Guilds representing talent in the motion picture industry, affirm the rule that each broadcast is a performance for which the performer is entitled to payment.

C. Relationship of System of Talent Compensation in Television to the Protection of the Producer's Copyright.

The heart of the entire system of residuals provided under the various collective bargaining contracts between the Talent Guilds and the film producers is the protection which the film producers and their distributors have under the present copyright laws against the unauthorized performance of their copyrighted motion pictures on television. The copyright laws of the United States do not extend copyright protection to a performer in his performance or the interpretation of his role in a motion picture, or to the director for his creative talent in directing. Writers, when writing independently, have copyright protection. When working as employees, their work under the copyright laws normally would become the property of the producer

[9]Under the AFTRA 1966-69 National Code of Fair Practice for Network Television Broadcasting, such payments are each percentages of the performer's original minimum scale and aggregate for eight replays, 320% of the program fee paid to the performer for the original broadcast.

who hires them. Like actors and directors, their right to obtain additional compensation for television use of their work derives from collective bargaining contracts with their producer employers.

As a result, actors, writers and directors have been compelled to rely entirely on derivative rights established by collective bargaining contracts between their Guilds and their employers to obtain equitable compensation for the utilization of their creative efforts on television. These rights are in turn grounded on the producer's exclusive right to use the copyright. In brief, it is the license fees which motion picture producers and their distributors receive for the use of their copyrighted motion pictures, and which owners of live and recorded television program material receive for the use of such material, that generate the funds from which residuals are paid.

ARGUMENT.

A. The Position of Petitioner Herein, if Sustained, Would Have the Immediate and Direct Effect of Depriving Talent of Compensation to Which It Is Entitled When Theatrical Motion Pictures Are Exhibited Over Television.

The exhibition of theatrical motion pictures over television constitutes a large part of present-day television programming.[10] Under nation-wide collective bargaining contracts, actors and writers earn an important part of their compensation from such telecasting, while motion picture directors depend upon such compensation in part to fund their pension plan. If Petitioner and other CATV systems are allowed to pick up and transmit by wire or cable into the homes of their paying subscribers, copyrighted motion pictures broadcase by television networks or stations that have been licensed to make such broadcasts, without obligation to make any payment to the producer or distributor for such privilege, actors, writers and directors would suffer a serious and immediate financial detriment. In the first place, it would give to a new sector of the television broadcasting industry, of potentially enormous size and geographical coverage, the right to utilize the results of the performances of actors and of the talents of writers and directors without payment of any compensation therefor.[11] Such appropriation

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[10]A survey made by Screen Actors Guild showed that 704 domestic theatrical motion pictures were exhibited over television in a typical week (February 5-11, 1966) in five cities as follows: Los Angeles—226; New York—144; Boston—111; San Francisco—112; and Pittsburgh—111.

[11]It is obvious that the 1700 CATV systems that have literally mushroomed in recent years with knowledge that eventually they

(This footnote is continued on the next page)

of creative and artistic services is *per se* inequitable and should be opposed by public policy.

Moreover, television stations want fresh programs, not those that have already been shown in their area. Consequently the film producers and their distributors would not be able to sell programs to television stations in cities served by CATV systems, at an adequate price, or possibly not at all, if they have either already been shown in such cities or may be shown there later over a CATV system. In either case, the distributor's gross revenue would be reduced and the share thereof payable to Talent Guild members proportionately lessened. Thus, talent would suffer in two ways: (a) by being deprived of compensation from the CATV system when it picks up and broadcasts a motion picture to its subscribers without authority of the copyright owner; and (b) when the producer or distributor who has the distribution rights, tries to sell the picture in cities served by a CATV system and finds it must either sell at a lower price or lose the sale.

B. Petitioner's Position, if Sustained, Would Create a Deterrent to the Production of New Television Film Programs and Would Depress the Syndication Market From Which Rerun Fees to Talent Are Derived.

Most television film programs are initially exhibited over television networks for their first run. The producer usually loses money or, at the most, may break even from such network exhibition. It must look to the syndication market to make its profit, and the actors,

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may have to pay copyright fees, would multiply many times if they were assured that they could operate hereafter without liability for infringement.

writers and directors who render services in such programs likewise are dependent on the syndication market for rerun fees.

The revenue from this syndication market would be seriously reduced if CATV systems were permitted to bring copyrighted television film programs to their subscribers without payment to the copyright owner. Here one must consider not the present size of the CATV industry, but rather, its impact in the future when CATV systems have proliferated throughout numerous areas of the country.

At such time, if not subject to control and licensing by the copyright owner, CATV systems inevitably would be in a position to pick up television film programs from many large cities and penetrate numerous nearby cities ahead of the film syndicator. For example, they could import New York programs into Philadelphia; Baltimore programs into Washington, D.C.; Los Angeles programs into San Diego; Chicago programs into Detroit, etc. In each case, a part of the viewing audience would be lost to the local television station that later purchases the program from the licensed syndicator. This would create an insurmountable obstacle to the syndicator when it tries to sell the programs to local stations in such cities. The syndicator could not guarantee the local station that it will be the first station in the area to show such programs because they have already been seen locally by the subscribers to the CATV system. Even if not yet seen, the syndicator could not give such a promise, since there would be no assurance that the CATV system would not subsequently pick up the programs from a nearby city and broadcast them before the local station has been

able to schedule their broadcast. The syndicator would thus stand to either lose the sale entirely or be forced to make it at a reduced price in a fragmented viewing market.

As a result, the sale of television programs in syndication in numerous areas throughout the United States would be materially affected. The effect of such curtailment of the potential market might well be to make the continued production of many television programs unprofitable. This could have a serious effect on the employment opportunities of which are, at best, sporadic and scarce.

It would also in many cases deprive actors, writers and directors of rerun fees which now constitute a substantial part of their income. For example, assume that a television program has concluded its network run, goes into syndication and is first shown in Los Angeles or in New York. Under the collective bargaining pattern of all the Guilds, rerun fees become immediately payable to the talent, involved. These fees may involve a larger outlay for the produder than the total amount derived from its initial showing in a single major city. The producer or distributor expects, however, to make a profit by continuing the syndication in adjacent cities and numerous other cities throughout the United States from which it will ultimately realize sufficient revenue to reimburse it for such rerun fees and return a profit. If, however, CATV systems such as those of Petitioner have already brought the program to many such cities in advance of the licensed syndicator, the syndicator's potential market may be so emasculated as to make any syndication of the program impracticable.

Petitioner's position thus poses a serious threat to the employment and income of the major talent groups in the motion picture and television industries.

C. To Hold That Petitioner Has a License Implied in Law to Broadcast Respondent's Copyrighted Motion Pictures Would Deprive Talent of the Fruits of Their Creative Efforts.

Petitioner contends that if its operations are not, as a matter of law, outside the scope of the copyright law, it should be deemed to have an implied in law license under the copyright law to transmit television programs to its subscribers. This is, of course, but another way of saying that the copyright laws should not be applied to the activities of a CATV system. Labeling such claimed exemption an "implied in law license," adds nothing to support Petitioner's position.

As already pointed out herein, payment to talent for the television exhibition of theatrical and television motion pictures is based on the premise that the original employer owns or controls the copyright and is therefore able to derive income from its exploitation in which, under long-established patterns of collective bargaining, such talent shares. To hold that a CATV system has an implied in law license to broadcast programs to its subscribers without compensation to the copyright owner would completely nullify this concept. The members of the Talent Guilds could not, of course, share in the income derived by the motion picture producers from such broadcasts, since the producers and their distributors would derive none. Neither could they share in the income which the CATV systems receive, since such systems do not employ talent and have no collective bar-

gaining contracts with the Guilds. Thus, the foundation on which talent has been historically paid for their television services would be destroyed. Certainly, no compelling considerations of public policy require recognition of an implied in law license to achieve such result.

Conclusion.

It is respectfully submitted that the meritorious position of Respondent herein finds further support in the special considerations affecting the major talent groups set forth herein.

Respectfully submitted,

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